Supreme Court, U.S.
FILED

No. 061506 MAY 11 2007

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IN THE

United States Supreme Court

ROBERT V. VITOLO, M.D.,

Petitioner,

v.

MENTOR CORPORATION,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 11, 2007

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals affirmed the entry of summary judgment against Dr. Vitolo based on a determination that Dr. Vitolo failed to present evidence on an issue that was not raised, briefed, or argued in the district court. By invoking its authority to "affirm on any ground" to enter summary judgment instead of remanding the case, the Court of Appeals deprived Dr. Vitolo of any opportunity to present evidence on the issue, taking away his right to a trial without due process. In light of the circuit court split on the issue, should the Petition be granted to establish that a federal appellate court does not have the authority to grant summary judgment based on an issue not raised, briefed, or argued in the district court?

2. Had this diversity case remained in New York state court, the trial court would have been bound by a decision of the Appellate Division, Second Department directly on point which established that Dr. Vitolo could invoke New York General Business Law Section 349 "in these circumstances." *Vitolo v. Dow Corning Corp.*, et al., 634 N.Y.S.2d 362 (1995), *aff'd in relevant part*, 651 N.Y.S.2d 104 (2d Dep't 1996). (App. 24a-37a.) The Court of Appeals disregarded this precedent in holding that Dr. Vitolo could not bring a claim under Section 349, despite the absence of any contrary precedent from New York's highest court. Should the Petition be granted to clarify that, consistent with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting under diversity jurisdiction is bound by a state intermediate appellate court decision interpreting a state statute that would have been controlling had the case been pending in a state trial court?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Robert V. Vitolo ("Vitolo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 3a) is unreported. The opinion of the United States District Court for the Eastern District of New York (App. 9a) is reported at 426 F. Supp. 2d 28.

JURISDICTION

The court of appeals entered its judgment on January 3, 2007. (App. 3a.) A timely petition for rehearing was denied on February 13, 2007, (App. 1a), and the petition for a writ of certiorari is accordingly due on May 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

New York General Business Law Section 349(a) provides, in pertinent part:

> (a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

New York General Business Law Section 349(h) provides, in pertinent part:

> (h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

STATEMENT OF THE CASE

This case presents significant issues with respect to the authority of federal appellate courts to grant summary judgment *sua sponte* on grounds not raised, briefed, or argued in the district court. This case also presents an important issue regarding a federal court's authority when exercising diversity jurisdiction to interpret and apply state statutes in a manner that results in an outcome entirely different than what would have occurred had the case remained in state court.

Petitioner Robert V. Vitolo, M.D. ("Dr. Vitolo") originally brought suit against Respondent Mentor Corporation ("Mentor") in the Supreme Court, Richmond County, New

York. The case was removed by Mentor to the United States District Court for the Eastern District of New York under 28 U.S.C. § 1441.

Dr. Vitolo sued Mentor seeking to recover surgical fees and other damages for violations of New York General Business Law Section 349 and common law fraud based on Mentor having sold the Mentor Leaf Valve ("MLV") breast implants to hundreds of doctors like Dr. Vitolo, who performed surgeries using those implants on thousands of individuals, while knowing that the MLV did not function as advertised or represented.

In particular, Mentor falsely represented to Dr. Vitolo and to other doctors in its marketing materials and sales presentations that the MLV implants had only a one to two percent deflation rate when Mentor knew that the device had a failure rate well in excess of that amount. (R. 10.1-10.13.)[1] Mentor sold more than 40,000 MLV implants to doctors across the country, including hundreds of doctors in New York State alone. (R. 134, 452-54.)

Doctors all over the country experienced high deflation rates, resulting in thousands of patients being forced to undertake the risk of additional surgical procedures. (R. 114, 137, 176, 233.) The excessive failure rates of the MLV implant eventually became widely known, and the Food and Drug Administration ("FDA") investigated the matter. (R. 10.1-10.13, 39, 581.) Mentor misled the FDA by telling the agency that the deflation rates were caused by doctor misuse of the product and sterilization problems. (R. 439-40.) The FDA eventually issued a recall for the

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[1] The Record on Appeal in the Second Circuit will be cited as "R. ___."

devices, and Mentor destroyed its entire inventory of MLV implants. (R. 10.1-10.13, 39, 581.)

As a direct result of Mentor's deceptive acts, Dr. Vitolo was required to perform a large number of free surgical procedures on his patients and suffered other economic damages, including payment of hospital costs and anesthesia fees. (R. 10.1-10.13.) Dr. Vitolo sought damages for surgical fees incurred when the MLV implants supplied by Mentor deflated and had to be replaced, as well as hospital and anesthesia fees arising from Mentor's misconduct. (R. 10.1-10.13.)

Mentor moved for summary judgment in the District Court on the ground that as a physician, Dr. Vitolo could not pursue a claim under Section 349 because Mentor's deceptive conduct was not "consumer oriented" given that Dr. Vitolo was only an intermediary between Mentor and Dr. Vitolo's patients, who received the defective implants. Dr. Vitolo opposed the motion, proffering documentary evidence that the MLV implant was distributed widely, that physicians and patients in New York State and around the nation experienced similar excessive deflation rates, and that Mentor was aware its representations were false. (R. 307-09, 315-2-, 335-40, 344-51, 410-14.) The District Court granted Mentor's motion and dismissed all Dr. Vitolo's claims, holding, as a matter of law, that because the damages sought in his initial complaint were not the type that Section 349 was intended to remedy, Mentor's conduct was not consumer oriented. (App. 16a-17a; R. 9, 577 90.)

The United States Court of Appeals affirmed, but not on any of the grounds raised or briefed by the parties in District Court before the record was closed. Instead, the Panel held that Dr. Vitolo failed to proffer evidence raising a tri-

able issue of fact as to whether Mentor's misrepresentations had a broader impact on consumers at large because he did not adduce evidence that (1) "Mentor's personnel made such representations to other doctors or to end users," (2) that members of the public other than Dr. Vitolo and his own patients were affected by the misrepresentations, and (3) that any agency was required to "undertake unnecessary investigations" or "divert [its] attention from its normal activities" because of Mentor's misrepresentations. (App. 5a-6a.) The Court of Appeals denied Dr. Vitolo's Petition for Rehearing and Rehearing En Banc on February 13, 2007. (App. 1a.)

REASONS FOR GRANTING THE PETITION

POINT I IN LIGHT OF THE CIRCUIT COURT SPLIT ON THE ISSUE, THE PETITION SHOULD BE GRANTED TO ESTABLISH THAT A FEDERAL APPELLATE COURT DOES NOT HAVE THE AUTHORITY TO GRANT SUMMARY JUDGMENT BASED ON AN ISSUE NOT RAISED, BRIEFED, OR ARGUED IN THE DISTRICT COURT.

The Petition raises important issues of summary judgment procedure and scope of appellate review. Specifically, the decision in this case raises significant issues related to the Court of Appeals' generally recognized authority to affirm a decision of a district court on "any ground." The Second Circuit affirmed entry of summary judgment dismissing Dr. Vitolo's claim under New York General Business Law § 349 based on his alleged failure to proffer evidence on an issue that was never raised, briefed, or argued in the district court.

In doing so, the Second Circuit deprived Dr. Vitolo of the procedural safeguards embodied in Federal Rule of Civil Procedure 56, given that he never had the opportunity provided by that rule to present evidence sufficient to raise a triable issue of fact with respect to the public impact of Mentor's conduct before the evidentiary record was closed.

The federal appellate courts have split on the question of when it is appropriate to affirm entry of summary judgment on a ground not raised, briefed, or argued in the district court. This case also presents the question of whether the federal appellate court's invocation of their authority to affirm on any ground deprives a litigant of due process of law where the ground was not raised, briefed, or argued in the District Court. Where, as here, the court of appeals affirms a grant of summary judgment based on an alleged absence of evidence on an issue not raised or argued in the lower court, serious due process issues are implicated. The essence of due process is notice and an opportunity to be heard. By affirming on any ground without providing such an opportunity to be heard on the dispositive issue, the Second Circuit here deprived Dr. Vitolo of the protections of the federal rules governing summary judgment practice, thereby depriving him of his right to a trial on the merits without due process. Because this Court's guidance is needed on this significant and recurring issue of appellate review, the Petition should be granted.

A. The Second Circuit Affirmed Summary Judgment Based on a Determination That Dr. Vitolo Failed to Present Evidence on an Issue That was not Raised, Briefed, or Argued.

This case presents the issue of when it is appropriate for a federal appellate court to affirm entry of summary judg-

ment on a ground not raised, briefed, or argued in the district court. In this case, the district court entered summary judgment in favor of Mentor based on Mentor's assertion that Dr. Vitolo had no standing to assert a claim under Section 349 because the dispute between Dr. Vitolo and Mentor was strictly private and that Dr. Vitolo was not the type of consumer the statute was intended to protect. Mentor cited district court decisions like *Pfizer, Inc. v. Stryker Corp.*, 2003 WL 21660339 (S.D.N.Y. 2003), and *In re Rezulin Products Liability Litigation*, 392 F. Supp. 2d 597 (S.D.N.Y. 2005) for the proposition that in disputes involving unique business transactions between sophisticated parties, Section 349 does not apply. Mentor relied on this ground despite the fact that Mentor's own witnesses testified that Dr. Vitolo received no special treatment or prices from Mentor, and that transactions for his purchase of the MLV were identical to transactions involving hundreds of other doctors in New York and throughout the country.

Invoking its authority to "affirm on any grounds," the Second Circuit *sua sponte* raised new issues that had not been raised, briefed, or argued in the district court. Specifically, Mentor did not contend in the district court that Dr. Vitolo could not prevail on his claim because there was no evidence, documentary or otherwise, that Mentor made any misrepresentations to other doctors or end users. Nor did Mentor contend that to defeat the motion, Dr. Vitolo had to proffer affidavit testimony from other doctors to whom Mentor made the same misrepresentations. Had this issue been raised or identified by either Mentor or the District Court, Dr. Vitolo could have conducted additional discovery or otherwise secured testimony by affidavit that Mentor made similar or identical representations regarding MLV deflation rates to other physicians and/or end users.

Similarly, when the Court of Appeals decided to raise the issue, it could have remanded to the district court, or requested that the parties brief the issue so that Dr. Vitolo and Mentor would have an opportunity to be heard. The Second Circuit instead held, as a matter of law, that because Dr. Vitolo failed to proffer evidence on an issue of which Dr. Vitolo, Mentor, and the district court were not aware, the summary judgment order would be affirmed.

B. The Courts of Appeals Are Divided on the Important and Recurring Question of When it is Appropriate to Affirm Entry of Summary Judgment on a Ground not Raised, Briefed, or Argued in the District Court.

This case presents the Court with an opportunity to resolve a persistent conflict among the federal courts of appeals regarding how an appellate court reviews a district court's entry of summary judgment. As Justice Scalia has pointed out, allowing an appellate court to resolve issues that were never raised in the district court calls into question the very nature of our justice system. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("the rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."). This Court has not directly addressed this issue, particularly in the context of a summary judgment proceeding. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.")

In the absence of specific guidance, courts have articulated different standards regarding when it is appropriate to affirm entry of summary judgment on a ground not raised, briefed, or argued in the district court. While every Circuit recognizes the rule that a court of appeals has the authority to affirm summary judgment on any grounds, there is a split among the Circuits regarding whether summary judgment may be affirmed when the nonmovant had no opportunity to present evidence on what the appellate court decides is the dispositive issue. This Court's guidance is needed to resolve this important, recurring issue.

1. At Least Five Circuits, Including the Second Circuit, Claim the Power to Affirm on Any Ground Whether or not That Issue was Raised, Briefed, or Argued in the District Court.

At least five circuits have held that a federal appellate court has the authority to affirm entry of summary judgment on any ground presented by the record, whether or not the issue was raised, briefed, or argued in the district court.

The First Circuit, for example, holds that it has the power to affirm a district court's entry of summary judgment "on any ground revealed by the record." *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006). The court appears to impose no requirement that either the district court or the parties raised the issue in the district court.

The Second Circuit has made it clear that it is not limited to issues that were actually raised in the district court:

> We may, of course, affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely.

Cromwell Assocs. v. Oliver Cromwell Owners, Inc., 941 F.2d 107, 111 (2d Cir. 1991). In *Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000), the court indicated that in many cases, the preferred practice is to remand a case to the district when an issue was not raised. *Schonfeld, 2*18 F.3d at 184. Nevertheless, the court does not hesitate to ignore this "preferred practice," as it did here, when the Second Circuit exercised its authority by affirming the district court's entry of summary judgment based on Dr. Vitolo's alleged failure to present evidence on an issue that was never raised, briefed, or argued in the district court.

The Eighth Circuit has similarly held that an order entering summary judgment may be affirmed "for any reason supported by the record, even if it differs from the rationale of the district court." *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 578 (8th Cir. 2006). The Eighth Circuit has recognized, however, that in some circumstances, when a party had no notice that an issue would be considered, due process concerns require reversal and remand of a summary judgment order *See Bendet v. Sandoz Pharmaceuticals Corp.*, 308 F.3d 907, 912 (8th Cir. 2002). The Eighth Circuit, however, has not clarified the application of this principle.

The Tenth Circuit also holds that an appellate court may "affirm a grant of summary judgment on grounds other than those relied on by the district court when the record contains an adequate and independent basis for that result." *Bones v. Honeywell, Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004); *Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir. 1988)

The Federal Circuit has likewise held that an appellate court may affirm on any ground "so long as the record fair-

ly supports such an alternative disposition of the issue." *Banner v. United States*, 238 F.3d 1348, 1355 (Fed. Cir. 2001). These courts have not indicated that an appellate court's authority is limited when an issue was not raised, briefed, or argued in the district court.

2. Other Circuits Have Rejected Affirming Entry of Summary Judgment When the Parties had no Opportunity to Present Evidence or Argue the Dispositive Issue.

By contrast, there are decisions in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and District of Columbia circuits recognizing that there are limits to a federal appellate court's authority to affirm on any ground. It is clear, however, that the formulation of these limits is not uniform among these courts.

The Third Circuit has indicated that while an appellate court may generally affirm entry of summary judgment on different grounds than the district court, the issue forming the basis of the appellate court's ruling must have at least been before the district court. *Nasir v. Morgan*, 350 F.3d 366, 368 (3d Cir. 2003), *citing Morse v. Lower Merion School District*, 132 F.3d 902, 904 n. 1 (3d Cir. 1998); *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 978 (3d Cir. 1998).

The Fourth Circuit specifically recognizes that an appellate court may affirm entry of summary judgment on any legal and factual basis, as long as it was fairly presented in the district court. *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 439 n.9 (4th Cir. 1999). In *Adventure Communications*, the court directed the parties to submit additional briefs to address

an issue that had not been raised, briefed, or argued in the district court. *Id.*

The Fifth Circuit has refused to affirm a district court's decision on a ground that was never raised below. *FDIC v. Laguarta,* 939 F.2d 1231, 1240 (5th Cir. 1991) (refusing to affirm summary judgment on grounds "neither raised below . . . nor even raised sua sponte by the district court").

The Sixth Circuit has held that an order granting summary judgment should only be affirmed on a theory when the nonmovant had an opportunity to respond to that theory. *Henderson v. Walled Lake Consol. Schools*, 469 F.3d 479, 494 (6th Cir. 2006) ("we may affirm on other grounds, as long as the opposing party is not denied the opportunity to respond to the new theory.").

The Seventh Circuit has indicated that summary judgment may only be affirmed on a ground that was "adequately presented" in the district court "so that the nonmoving party had an opportunity to submit affidavits or other evidence and contest the issue." *Smurfit Newsprint Corp. v. Southeast Paper Mfg.*, 368 F.3d 944, 954 (7th Cir. 2004). If this standard had been applied, the Second Circuit could not have affirmed the decision in this case because Dr. Vitolo had no opportunity to submit any evidence on the issue the Second Circuit determined was dispositive.

In *Forest Guardians v. United States Forest Service*, 329 F.3d 1089 (9th Cir. 2003), the Ninth Circuit recognized that while it has the power to affirm the district court on any ground, that ground must be both supported by the record and been briefed by the parties. *Forest Guardians,* 329 F.3d at 1097. (9th Cir. 2003), *citing United Stated v. Gonzalez-Rincon*, 36 F.3d 859, 866 (9th Cir. 1994).

The Eleventh Circuit has explicitly rejected what the Second Circuit did in this case. In *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006), the court held that the power to affirm on any ground does not apply "where the correctness of the lower court's decision depends upon a determination of fact." *Guevara*, 468 F.3d at 1306. In reaching this conclusion, the Eleventh Circuit cited this Court's decision in *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943). In *Chenery*, this Court stated that "where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *Chenery*, 318 U.S. at 88.

The District of Columbia Circuit has stated that the entry of summary judgment may be affirmed "on a ground not relied upon by the lower court, provided that the opposing party has had a fair opportunity to dispute the facts material to that ground." *Washburn v. Lavoie*, 437 F.3d 84, 89 (D.C. Cir. 2006). In this case, Dr. Vitolo had no opportunity to dispute the facts material to the ground on which the Second Circuit relied.

This Court's previous discussions of this issue have not prevented a split from arising among the circuits. The petition should be granted to establish a uniform standard for when an appellate court may or may not affirm the entry of summary judgment on a ground not raised, briefed, or argued in the district court. This issue is particularly important because litigants like Dr. Vitolo have been stripped of the procedural protections provided by Federal Rule of Civil Procedure 56, and this deprivation also affected the litigants' due process rights.

C. By Using That Power to "Affirm on any Ground" on an Issue not Raised, Briefed, or Argued in the District Court, the Appellate Court Infringes on a Litigants Due Process Rights.

This case presents the Court with the opportunity to address whether an appellate court's decision to affirm entry of summary judgment on a ground not raised, briefed, or argued in the district court deprives the non-movant of due process rights. More than 20 years ago, the Second Circuit itself recognized that affirming on a ground not raised, briefed, or argued could raise significant issues of fairness, particularly when the parties did not have an opportunity to develop the relevant facts. *See Arlinghaus v. Ritenour,* 622 F.2d 629, 638 (2d Cir. 1980). Nevertheless, the Second Circuit did not give Dr. Vitolo an opportunity to develop the facts on the critical issue that formed the basis of its decision to affirm the district court's decision.

The Second Circuit's decision, as well as holdings in other courts claiming the power to affirm on any ground whether or not raised in the district court raises an important question related to summary judgment procedure and the impact a *sua sponte* affirmance has on a party's right to due process. *See Bendet v. Sandoz Pharmaceuticals Corp.*, 308 F.3d 907, 912 (8th Cir. 2002) (where party not given notice that issue would be considered, due process concerns required reversal of summary judgment order and remand to allow party to present evidence on issue); *see also Brown v. St. Louis Police Department*, 691 F.2d 393, 396 (8th Cir. 1982) (court recognized that there are situations where it would be fundamentally unfair to affirm on grounds not raised below). It is clear that the opportunity to be heard is a fundamental right of due process. *See Nel-*

son v. Adams USA, Inc., 529 U.S. 460, 466 (2000) (recognizing that the fundamental requirement of due process law is the opportunity to be heard). That right is protected by the procedural safeguards found in Federal Rule of Civil Procedure 56, which specifically gives a nonmovant the opportunity to present evidence raising a triable issue of fact. Dr. Vitolo had no such opportunity because the issue the Second Circuit held was dispositive was never raised in the district court before the evidentiary record was closed. The Second Circuit granted summary judgment against Dr. Vitolo without ever giving him the opportunity provided by Rule 56. The Petition should be granted to address whether *sua sponte* affirmance of a summary judgment order based upon the failure to present evidence on an issue not raised, briefed, or argued before the record was closed is appropriate and comports with due process.

D. This Court Should Grant This Petition to Establish Limits on the Appellate Courts' Authority to "Affirm on any Grounds" and Protect the Litigants Due Process Rights.

This issue is of great concern. As discussed above, it has been percolating through the federal courts over the past few years and has also been recognized by academia. *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 252-53 (2002); *see also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253, 1310 (2002). In a concurrence in *Thomas v. Crosby*, 371 F.3d 782 (11th Cir. 2004) (Tjoflat, J., concurring), Judge Tjoflat recognized that there are "significant questions about the power of circuit courts to con-

sider matters *sua sponte*." *Thomas*, 371 F.3d at 788. While *Thomas* involved the appeal of a *habeas corpus* petition, Judge Tjoflat addressed the issue of *sua sponte* appellate decisions in general. *Id.* Judge Tjoflat pointed out that it is beyond dispute that when justice requires it, a court of appeals has the power to consider issues not raised on appeal, however, the power is most often used in the context of plain error. *Id.* at 793. Judge Tjoflat noted, however, that that given the absence of guidance on the issue, "the conditions under which a court may consider a non-jurisdictional matter *sua sponte* have never been adequately considered and have caused a great deal of confusion among jurists." *Id.* Ultimately, Judge Tjoflat concluded that where a circuit panel raises an issue *sua sponte*, the court should request supplemental briefing from the parties and permit oral argument, so that the parties have an opportunity to be heard on the issue. *Id.* at 802.

Here, neither Dr. Vitolo nor Mentor had the opportunity to be heard on the issue raised *sua sponte* by the Second District. Given the significant issues raised by affirming entry of summary judgment on a ground not raised, briefed, or argued in the district court, this Court should grant the Petition to establish the scope of the appellate court's authority to affirm on any ground.

POINT II THE PETITION SHOULD BE GRANTED TO CLARIFY THAT, CONSISTENT WITH *ERIE R.R. CO. V. TOMPKINS*, 304 U.S. 64 (1938), A FEDERAL COURT SITTING UNDER DIVERSITY JURISDICTION IS BOUND BY A STATE INTERMEDIATE APPELLATE COURT DECISION INTERPRETING A STATE STATUTE THAT WOULD HAVE BEEN CONTROLLING HAD THE CASE BEEN PENDING IN A STATE TRIAL COURT.

This case also calls for the exercise of this Court's supervisory authority over the administration of federal diversity jurisdiction. Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts exercising diversity jurisdiction should obtain results substantially similar to those reached by state courts, considering the same cause of action. The question posed by this petition is, when there is settled authority from a state intermediate appellate court interpreting a state statute that would have been binding had the case remained in state court, may a federal court ignore that authority and instead make new state law? The Petition should be granted to clarify the *Erie* doctrine and establish that when a federal court sitting under diversity jurisdiction is applying a state statute, that court is obligated to follow precedents from a state's intermediate appellate courts that would have been binding were the case pending in state court. The Court should resolve this issue to prevent litigants from engaging in forum shopping in an effort to avoid unfavorable state court precedents that federal courts are now given license to ignore, as the Second Circuit did here by ignoring *Vitolo v. Dow Corning Corp., et al.*, a case directly on point.

A. Under New York Intermediate Appellate Court Precedent That Would Have Been Binding on a State Trial Court Hearing This Case, Dr. Vitolo Could Bring a Claim Under New York General Business Law Section 349.

The Second Circuit held that Dr. Vitolo could not pursue a claim under New York General Business Law Section 349.[2] (App. 5a-6a.) Had this case not been removed to federal court, however, it is clear that Dr. Vitolo would have been able to pursue his claim under Section 349. Before Mentor removed the case, the case was pending in the New York Supreme Court, Richmond County, and that court falls under the appellate jurisdiction of the Appellate Division, Second Department.

There is direct, on point precedent in that court—in a case brought by Dr. Vitolo himself against another breast implant manufacturer—establishing that Dr. Vitolo can pursue a claim under Section 349. Specifically, the Appellate Division, Second Department affirmed an order holding, under materially indistinguishable circumstances, that Dr. Vitolo is a consumer with standing to seek relief under

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[2] New York General Business Law Section 349 provides a remedy for parties that are damaged due to the deceptive practices of others. Section 349(a) states that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." N.Y. Gen. Bus. Law § 349(a). Section 349(h) grants a private right of action to any person who has been injured by a violation of the statute. N.Y. Gen. Bus. Law § 349(h). The New York Court of Appeals has stated that "a plaintiff under Section 349 must prove three elements: first, that the challenged act or practice was consumer oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." Stutman v. Chemical Bank, 709 N.Y.S.2d 892, 895 (N.Y. 2000).

Section 349. *Vitolo v. Dow Corning Corp.*, et al., 634 N.Y.S.2d 362 (1995), *aff'd in relevant part*, 651 N.Y.S.2d 104 (2d Dep't 1996). (App. 24a-37a.) In *Vitolo v. Dow Corning*, Dr. Vitolo sued Dow Corning and Bristol Myers Squib for, *inter alia*, violations of Section 349 based on Dow Corning and Bristol Myers Squib's conduct in concealing information regarding the silicone breast implants that Dr. Vitolo implanted in approximately 1800 patients. (App. 28a-30a.) The defendants asserted that Dr. Vitolo, as the physician who performed the implantation procedures, was not a consumer within the meaning of Section 349. (App. 35a-36a.) The court rejected this argument, concluding that Dr. Vitolo could pursue a claim under Section 349 against the implant manufacturers and noting that "victims of indirect injuries are permitted to sue under the Act." (App. 35a-36a.) In this case, Dr. Vitolo is also an intermediary victim of the injuries to his patients and others resulting from Mentor's deceptive acts. As in *Vitolo v. Dow Corning*, Dr. Vitolo was the physician who performed the implantation procedures based on misrepresentations made by the manufacturer of the implants. Dr. Vitolo incurred thousands of dollars in expenses when he was forced to perform additional free surgical procedures on his patients after their MLV implants deflated. (R. 274.)

Although the decision in *Vitolo v. Dow Corning* was cited by the parties and discussed by the district court in a footnote, the Second Circuit completely ignored this precedent. Instead, the Second Circuit held that because only Dr. Vitolo and his patients were purportedly affected by Mentor's deceptive conduct, Dr. Vitolo could not invoke Section 349. (App. 5a-6a.) There is no such requirement under the *Dow Corning* precedent. Had the case been

pending in a state court, it is clear that the outcome would have been different.

B. The Second Circuit Ignored the Appellate Division's Precedent Even Though There was no Conflicting Decision From the New York Court of Appeals.

The Petition should be granted to address whether it is proper for a federal court to ignore a decision by a state intermediate appellate court in the absence of any contrary authority from that state's highest court. In *West v. AT&T*, 311 U.S. 223 (1940), this Court recognized that decisions of intermediate appellate courts should be recognized as authoritative:

> A state court is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another rule is preferable.

West, 311 U.S. at 236-37. This Court went on to state that a decision by an intermediate appellate court is "a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* at 237. The Second Circuit itself has stated that generally, federal courts are bound to apply the decisions of intermediate appellate courts in the absence of evidence

that the state's highest court would decide otherwise. *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 221 (2d Cir. 2003). Nevertheless, in this case, the Second Circuit disregarded precedent from the New York Appellate Division, Second Department when there was no authority indicating that the New York Court of Appeals would have decided otherwise.

Indeed, if the Second Circuit's decision is compared with the leading New York Court of Appeals' decision interpreting Section 349, it becomes clear that there was no basis for disregarding the decision in *Vitolo v. Dow Corning*. In its decision, the Second Circuit held that Mentor's conduct was not consumer-oriented because Dr. Vitolo did not demonstrate that individuals other than his patients "were affected." (App. 6a.) In *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 623 N.Y.S.2d 529 (N.Y. 1995), the Court of Appeals held that plaintiffs only need to show that the deceptive acts "potentially affect similarly situated consumers." *Oswego*, 623 N.Y.S.2d at 533. The Second Circuit stated that to invoke Section 349, Dr. Vitolo must make a showing of specific, individual misrepresentations to other physicians or end users to demonstrate an impact on consumers at large. (App. 6a.) The Court of Appeals has held that standard documentation used by the defendant and provided to other customers was sufficient to demonstrate an impact on consumers at large. *Oswego*, 623 N.Y.S.2d at 533. The Second Circuit held that Mentor's conduct was not consumer oriented because Dr. Vitolo did not demonstrate a pattern of misrepresentations to other physicians or end users. (App. 6a.) In contrast, the Court of Appeals has stated that "consumer-oriented conduct does not require a repetition or pattern of deceptive behavior. . . ." *Oswego*, 623 N.Y.S.2d at 532. Given that the Court of Appeals' decisions do not provide a basis for concluding that

intermediate appellate court decisions interpreting the statute should be disregarded, the Second Circuit's decision presents the important question of whether and when a federal court can interpret a state statute in a manner inconsistent with controlling state appellate authority.

C. To Avoid Situations Where the Outcome of a Case Depends on Whether it is Pending in State or Federal Court, This Court Should Establish That Intermediate Appellate Precedent That Would Have Been Binding on a State Trial Court Must be Followed by a Federal Court Absent Compelling Reasons for a Departure From That Precedent.

This Court's guidance is needed regarding whether federal courts sitting in diversity jurisdiction are obligated to follow decisions of intermediate state appellate courts. In *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940), this Court stated that "it is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." *Fidelity Union Trust*, 311 U.S. at 180. In the absence of guidance from this Court, however, the lower courts will continue to feel free to establish their own interpretation of state law and reach results like this—where the outcome of the case depends entirely on whether it is pending in state or federal court. In addition to the obvious inconsistency with the fundamental principles of *Erie*, the current regime will only encourage forum shopping in similar cases in the future.

The tension between the obligation to apply state law in uncertain cases and the constitutional limitations on federal authority to make state law becomes acute when, as

here, a federal court alters the interpretation of a state statute in a manner not contemplated, or indeed already rejected, by the state courts. Indeed, the present case is a good illustration of the dangers of federal judicial activism in the application of state law. The Second Circuit essentially overruled accepted and long-established interpretations of New York General Business Law Section 349 by imposing requirements on Dr. Vitolo, as a plaintiff seeking to invoke that statute, that have not been recognized by New York state courts. To reach this result, the Second Circuit had to ignore a decision involving Dr. Vitolo himself as a plaintiff, as well as other New York precedents.

There are significant costs to such federal court forays into state lawmaking. As a result of the Second Circuit's reinterpretation of Section 349, there now is one rule of New York law for litigants in state court and another rule for litigants who bring the same question of state law before federal courts sitting in diversity. Whether future victims of deceptive conduct will have the ability to bring an action under Section 349 will depend entirely on the courthouse in which the complaint is filed or whether a case brought in state court is removed to federal court. As this Court stated in *Fidelity Union Trust,* such discrepancies are intolerable under *Erie. Fidelity Union Trust,* 311 U.S. at 180; *see also Baldwin v. Alabama,* 472 U.S. 372, 374 (1985) (resolving "significant conflict" between the Eleventh Circuit and the Supreme Court of Alabama). Such a result is flatly inconsistent with the purpose of Rules of Decision Act, which

> is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in state courts, the other to be availed of in federal courts, only in cases of diversity of citizenship.

West, 311 U.S. at 236. This Court has made it plain that federal courts cannot, consistent with *Erie*, interpret state law in such a manner:

> In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so as far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). To avoid such results, this Court should grant the petition and make it clear that a federal court sitting in diversity should apply the precedents of state intermediate appellate courts that would have been binding had the case been pending in state court in the absence of compelling evidence that the state's highest court would decide otherwise.

CONCLUSION

The issues presented in this Petition are important questions of law involving this Court's supervisory authority over the federal courts, including the scope of federal appellate courts' authority to review district court decisions and the due process rights of litigants, and the role of the federal courts in interpreting state law. The Petition for a Writ of Certiorari should therefore be granted. In the alternative, the petition should be granted, the judgment vacated, and either the state law question certified to the New York Court of Appeals or the case remanded to the district court for additional briefing and an opportunity to present evidence on the issues identified by the Court of

Appeals with respect to New York General Business Law Section 349.

Respectfully submitted,

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May 11, 2007

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of February, two thousand seven,

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No. 06-1794-cv
Filed Feb 13, 2007

Present:

Hon. Jon O. Newman,
Hon. Peter W. Hall,
Circuit Judges,
Hon. Dora L. Irizarry,
District Judge. *

Robert V. Vitolo, M.D.,

Plaintiff-Appellant,

v.

Mentor H/S, Inc.,

Defendant-Appellee.

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* The Honorable Dora L. Irizarry, District Judge for the Eastern District of New York, sitting by designation.

ORDER

Plaintiff-Appellant Robert V. Vitolo moves for rehearing and rehearing en banc on our decision entered on January 3, 2007. Upon due consideration, the petition is hereby DENIED. We disagree that the two "Dear Doctor" letters, sent three and five years before Vitolo met with the Mentor sales representative, constitute evidence that Mentor misrepresented the deflation rate of the MLV implant to other doctors such that Vitolo's claim is actionable under N.Y. Gen. Bus. Law § 349. First, those letters refer to "Mentor RLV" implants, not "Mentor MLV" implants. Second, Vitolo has not shown that any misrepresentation arguably subject of the "Dear Doctor" letters had any "impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529 (1995). The District Court properly found that Vitolo's dispute with Mentor was a private contractual dispute, and therefore not within the ambit of § 349. The remaining arguments raised in the petition are without merit.

FOR THE COURT,
Thomas Asreen, Acting Clerk

By: LUCILLE CARR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT http://www.ca2.uscourts.gov/), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City

of New York, on the 3rd day of January, two thousand seven.

No. 06-1794-cv

PRESENT:

HON. JON O. NEWMAN,
HON. PETER W. HALL,
Circuit Judges,
HON. DORA L. IRIZARRY,
District Judge. *

ROBERT V. VITOLO, M.D.,

Plaintiff-Appellant,

v.

MENTOR H/S, INC.,

Defendant-Appellee.

For Plaintiff-Appellant: JONATHAN C. SCOTT, Scott & Scott, LLP, Smithtown, NY, (David A. Green, Law Offices of David A. Green, *on the brief*), New York, NY

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* The Honorable Dora L. Irizarry, District Judge for the Eastern District of New York, sitting by designation.

For Defendant-Appellee: EDWARD J. SEBOLD, (Ashlie E. Case, Mark A. Whitt, *on the brief*), Jones, Day, Reavis & Pogue, Columbus, OH

SUMMARY ORDER

Appeal from the United States District Court for the Eastern District of New York (Townes, *J.*) granting summary judgment to Defendant-Appellee.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is **AFFIRMED.**

Plaintiff-Appellant Dr. Robert V. Vitolo ("Vitolo") appeals from the grant of summary judgment to Defendant-Appellee Mentor H/S, Inc. ("Mentor") in this action concerning malfunctioning saline breast implants manufactured by Mentor and used by Vitolo in his breast augmentation practice. The following claims remained after half of the claims raised in the complaint were dismissed by stipulation: common law fraud, fraudulent inducement to enter into a contract, and violation of New York General Business Law § 349. We assume the parties' familiarity with the underlying facts and procedural history of this case.

We review the District Court's grant of summary judgment *de novo*. *See Steel Partners II, L.P. v. Bell Indus., Inc.*, 315 F.3d 120, 123 (2d Cir. 2002). The District Court properly granted summary judgment in this case.

To state a claim under N.Y. Gen. Bus. Law § 349, a plaintiff must move, among other things, that "the challenged act or practice was consumer-oriented." *Stutman v.*

Chemical Bank, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892 (2000). We agree with the District Court that Vitolo failed to raise an issue of material fact with respect to whether Mentor's alleged misrepresentation to Vitolo of the deflation rate of the implants in question was "consumer-oriented." The misrepresentation, if it did occur, had no "broader impact on consumers at large" than it did on Vitolo, and it did not have the potential to "affect similarly situated consumers" because the alleged misrepresentations regarding the MLV deflation rate were made to Vitolo in person, and Vitolo failed to produce evidence that Mentor's personnel made such representations to other doctors or to end users. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 27, 623 N.Y.S.2d 529 (1995). Only Vitolo and the limited group of his patients who were implanted with these particular products—not members of the public at large—were affected. Moreover, no agency or consumer group was required to "undertake unnecessary investigations" or "divert [its] attention from its normal activities" because of the alleged misrepresentation. *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264-65 (2d Cir. 1995).

With regard to the fraud claims, New York has carved out a limited exception to the rule that one cannot succeed on a fraud claim merely by demonstrating a breach of contractual duties. Under that exception, a plaintiff must either "(i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Bridgestone/Firestone, Inc. v. Recovery Credit Ser-*

vices, Inc., 98 F.3d 13, 20 (2d Cir. 1996) (internal citations and quotations omitted).

Vitolo has failed to meet any of these requirements. First, Vitolo failed to demonstrate that there was a public interest in assuring that the contract between him and Mentor be enforced giving rise to a separate duty of care. Unlike the central fire alarm monitoring services provided by New York City fire alarm companies, which contribute to the response time of the New York City Fire Department, the breast implants produced by Mentor do not risk the same kind of devastating effect on the public as faulty monitoring of fire alarm systems. Whether and how well they function are purely private matters. *Cf. Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 552-53, 583 N.Y.S.2d 957 (1992).

Second, Vitolo failed to demonstrate that there was a fraudulent misrepresentation collateral or extraneous to the contract. The deflation rate, which Vitolo contends was misrepresented to him, was directly related—not collateral—to the contract between him and Mentor. Even if the deflation rate was collateral to the contract, the District Court properly discounted the affidavit in opposition to the summary judgment motion, which was the only document in the record indicating that Vitolo had relied on the purported deflation rate in making his decision to buy the implants from Mentor. *See Hayes v. New York Dep't of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996).

Finally, Vitolo does not seek special damages that were caused by the alleged inducement and are unrecoverable as contract damages. Although his complaint contained a demand for $100,000,000 in punitive damages, such damages did not constitute "indemnity for [the] loss suffered through th[e allegedly fraudulent] inducement." *Deerfield*

Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956, 510 N.Y.S.2d 88, 89 (1986).

For the reasons stated above, the judgment of the District Court is hereby **AFFIRMED.**

FOR THE COURT,
THOMAS ASREEN, ACTING CLERK
By:

_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98CV2837(SLT)(VVP)
Filed March 31, 2006

DR. ROBERT V. VITOLO,

Plaintiff.

—against—

MENTOR H/S, INC.,

Defendant.

MEMORANDUM AND ORDER

TOWNES, U.S.D.J.

In this diversity action, Plaintiff seeks damages for losses sustained in removing and replacing certain saline breast implants from patients who suffered complications therewith. Plaintiff alleges that he was fraudulently induced to enter an agreement with the manufacturer, Defendant Mentor H/S, Inc., and was intentionally misled as to the safety of the implants, causing him monetary damages as well as damages to his professional reputation. Though the Complaint alleges causes of action sounding in negligence and breach of contract, those claims were dismissed pursuant to stipulations on June 4, 2002, and

March 8, 2006, respectively. Defendant seeks summary judgment dismissing the remaining claims of fraud, fraudulent inducement to enter a contract, and a violation of New York's General Business Law § 349. Based upon all submissions of the parties and oral argument held on March 17, 2006, and for the reasons stated below, Defendant's motion is granted in full.

FACTS AND PROCEDURAL HISTORY

Plaintiff Robert V. Vitolo, M.D. ("Plaintiff" or "Vitolo") is a plastic surgeon with several offices in the New York City metropolitan area. (Def. 56.1 Stat. ¶ 1.) Defendant Mentor H/S, Inc., ("Defendant" or "Mentor") is a subsidiary of Mentor Corporation, and manufactures, *inter alia*, saline-filled breast implants. (Def. 56.1 Stat. ¶ 2.) From approximately the early 1980s until August 1995, Defendant sold saline-filled implants known as the "1800 Series Smooth Round Marry Implant with Leaf Valve" (hereinafter "MLV"). (Def. 56.1 Stat. ¶3.) Though Plaintiff originally obtained his implants from McGhan Medical Corp. ("McGhan"), by late 1994, Plaintiff's business became extremely successful and his demand for implants began to exceed McGhan's ability to supply them. In response to Plaintiff's inquiry, Michael Lawrence, a Mentor sales representative, came to New York to discuss Mentor's implants with Vitolo. (Def. 56.1 Stat. ¶¶ 13-14.)

During their meeting, Plaintiff specifically requested the MLV implant. (Def. 56.1 Stat. ¶ 15.) At the time, Plaintiff had begun performing breast augmentation surgery using the umbilicus technique, in which, to reduce scarring, the implant would be inserted through the patient's navel, Def. 56.1 Stat. ¶¶ 10-12, as opposed to prior techniques that involved insertion in the armpit or along the breast. (Def.

56.1 Stat. ¶6.) Defendant claims that Plaintiff was cautioned against use of the umbilicus technique with the MLV. (Def. 56.1 Stat. ¶8-11.) Defendant warned that the device "may be easily damaged by surgical instruments or ruptured by excessive stresses, manipulation with a blunt instrument or penetration by a needle." (Def. 56.1 Stat. ¶9.) Though Defendant argues that, "[b]ecause the umbilicus procedure involved the use of a surgical instrument to move the implant from the belly button to the breast, the use of this procedure was inconsistent with [its] recommendations," Def. 56.1 Stat. ¶10, Plaintiff argues that *all* methods of implantation involve contact between the implant and surgical instruments, and that Defendant's warning therefore did not serve as a warning specifically against the umbilicus technique. (Pl. 56.1 Stat. ¶10.) Furthermore, Plaintiff argues that Defendant knew of and condoned the umbilicus procedure and recruited him knowing that it was his procedure of choice. (Pl. Mem. of Law Ex 36 (Vitolo Aff.) ¶7.)

The parties entered into an agreement whereby Defendant supplied Plaintiff with MLV implants. After Vitolo's patients experienced a total of 19 deflations within four months, Defendant exchanged the MLV implants for the Mentor 1600 Series Diaphragm Valve implants and began investigating the "unusually high" number of deflations that Plaintiff's patients suffered. (Def. 56.1 Stat. ¶¶19-21.) Pat Altavilla, Mentor's Executive Vice President of Marketing ("Altavilla") hypothesized that the umbilicus procedure was related to the number of deflations. (Def. 56.1 Stat. ¶24.) Plaintiff disputes this allegation, pointing out Defendant's failure to perform any scientific studies or analyses in support of this hypothesis. (Pl. 56.1 Stat. ¶24.)

Thereafter, in mid-1995, Altavilla traveled to New York to observe Plaintiff performing the umbilicus procedure.

(Def. 56.1 Stat. ¶26.) The night before the surgery, Plaintiff and Altavilla went to dinner at a restaurant. Unbeknownst to Altavilla, Plaintiff was tape recording their conversation. (Def. 56.1 Stat. ¶26.) During the dinner conversation, Plaintiff was adamant that the umbilicus procedure was not responsible for the high number of deflations. (Ex 7 to Def. 56.1 Stat. at 39-43.) Altavilla encouraged Plaintiff to go to Dallas, Texas, to reproduce the surgery for the benefit of Defendant's engineers, who would presumably study and determine the cause of the deflations. (*Id.* at 44-46.) Plaintiff never went, explaining that "that's what [Altavilla] offered but it never came to pass. It's just like me inviting you to dinner to be polite but you never get taken out to dinner." (Pl. 56.1 Stat. ¶33.)

The MLV came with a product replacement policy, providing that Defendant would provide a free replacement device and up to $1,000 in reimbursement for hospital and anesthesia fees. (Def. 56.1 Stat. ¶16.) Plaintiff argues that the offer for reimbursement was illusory, as it was conditioned upon patients signing a general release absolving Mentor for any tort liability, which patients were predictably reluctant to do. (Pl. 56.1 Stat. ¶16.) Nevertheless, after Plaintiff read a magazine article denouncing the umbilicus technique, he asked Altavilla to prepare a letter informing patients that Defendant would continue to honor its product replacement policy for patients who elected implantation using the umbilicus technique. (Def. 56.1 Stat. ¶¶34-5.) By this time, Plaintiff no longer used the MLV implant in new surgeries, though prior patients continued to complain of deflations thereof. (Def. 56.1 Stat. ¶¶36-7.)

Defendant conducted an investigation of the MLV implants, and discovered, *inter alia*, that an increased rate of deflation occurred when the implants were "autoclaved"

(steam sterilized prior to implantation). Defendant issued a "Dear Doctor" letter on September 1, 1995, in which physicians were advised of the dangers of autoclaving, as well as Defendant's finding that deflation could also occur when the MLV was implanted with the umbilicus procedure. (Def. 56.1 Stat. ¶¶46-47.) Plaintiff argues that the "Dear Doctor" letter is misleading, in that autoclaving a sterile implant prior to implantation is a rare event. (Pl. 56.1 Stat. ¶46.) Plaintiff alleges that Defendant knew the implants were defective but feared a public relations nightmare. (Pl. Mem. of Law Ex. 20.) As a result, Plaintiff argues, Defendant sent a copy of the "Dear Doctor" letter to the Food and Drug Administration ("FDA"), prompting a Class II recall (which does not require manufacturers to physically recall the product). (Def. 56.1 Stat. ¶48.) Despite the fact that this was not the type of recall that required Defendant to take the product off of the market altogether, Defendant nevertheless discontinued the MLV and destroyed its entire inventory. (Def. 56.1 Stat. ¶50.)

Plaintiff alleges that Defendant misrepresented the failure rate, inducing him to purchase the MLV implants. Plaintiff argues that Defendant knew the product contained defective valves, which, Plaintiff implicitly argues, is why Defendant destroyed $2 million worth of implants following the recall. (Pl. 56.1 Stat. ¶¶51-53.) Plaintiff filed the instant complaint (the "Complaint") in the Supreme Court of Richmond County on February 11, 1998, stating causes of action for negligence, breach of contract, fraud and fraudulent misrepresentation, and a violation of New York's General Business Law § 349 and on April 14, 1998, Defendant filed a Notice of Removal. On June 4, 2002 and March 8, 2006, the parties signed stipulations dismissing Plaintiff's negligence and breach of contract claims, respectively. What remains

are Plaintiff's claims of fraud and fraudulent inducement and Plaintiff's claim under New York's General Business Law § 349, and Defendant seeks summary judgment on each of those claims.

DISCUSSION

Summary judgment is appropriate where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "A fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). To be "genuine," an issue of fact must be supported by evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Holtz*, 258 F.3d at 62. Because the moving party bears the burden of showing that there are no genuine issues of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), "a court must resolve all ambiguities and draw all reasonable inferences against [it]." *Alston v. New York City Transit Authority*, 2003 U.S. Dist. LEXIS 21741, *4 (S.D.N.Y. 2003) (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

A. *Section 349 of New York's General Business Law*

"Section 349 of the General Business Law was intended to be a consumer protection statute." *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 145 (N.Y. App. Div. 1995). "In fact, prior to 1980, only the Attorney General could prosecute an action pursuant to General Business Law § 349." *Id.* "The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising." *Genesco Entertainment v.*

Koch, 593 F. Supp.2d 743, 751 (S.D.N.Y. 1984). "The statute was meant to empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses. It was not intended to supplant an action to recover damages for breach of contract between parties to an arm's length contract." *Teller*, 213 A.D.2d at 148. "The goals of GBL § 349 . . . were major assaults upon fraud against consumers, particularly the disadvantaged." *Id.* "The consumer-oriented nature of the statute is evidenced by the remedies it provides. Section 349(h) provides parties with the opportunity to receive the greater of actual damages or $50." *Genesco*, 593 F. Supp. 2d at 751.

To state a prima facie case under § 349, Plaintiff must show: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (N.Y. 2000). With regard to the first factor, "the gravamen of the complaint must be consumer injury or harm to the public interest." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995). "The critical question, then, is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor." *Id.*

Consumer-Oriented Conduct

In this case, there is no question that, to the extent Plaintiff suffered a redeemable loss on account of Defendant's behavior, it is not of the type that § 349 seeks to remedy. To show consumer-oriented conduct, Plaintiff would have to "demonstrate that the acts or practices [complained of] have a broader impact on consumers at large. *Private contract disputes, unique to the parties* . . . would not fall within the

ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (N.Y. 1995) (emphasis added).

The Complaint focuses almost entirely on the losses suffered by Plaintiff and his business, rather than to consumers or Plaintiff's patients. Specifically, Plaintiff complains of "loss of all patients who suffered damages," "damage to professional reputation," "loss of income from former patients . . . patient referrals . . . loss of professional time," "substantial additional marketing, training and advertising costs," "immeasurable and irreversible harm to his professional reputation . . . as well as substantial economic harm to his professional medical practice." (Complaint ¶¶9, 18, 32.) Under these circumstances, Plaintiff's claim must fail; "[w]here the gravamen of the complaint is harm to a business as opposed to the public at large, the business does not have a cognizable cause of action under § 349." *Gucci Amer., Inc. v. Duty Free, Ltd.*, 277 F. Supp. 2d 269, 274 (S.D.N.Y. 2003) (trademark infringement plaintiff could not bring § 349 action because "core harm" is to another business and not consumers, despite consumers' purchase of counterfeit goods); *see also In re Rezulin Prods. Liability Litigation*, 392 F. Supp.2d 597, 613 (S.D.N.Y. 2005) (health benefit providers could not recover under § 349 where defendant allegedly misrepresented safety of a drug intended to treat diabetes because "the nature of this marketing effort—communication from one sophisticated business to another—was quite different from that of any promotion aimed directly at diabetes patients"); *Pfizer, Inc. v. Stryker Corp.*, 2003 WL 21660339, at *4 (S.D.N.Y. Jul. 15, 2003) ("Although consumers eventually stood to be affected by any defects in the product at issue, the questions whether [seller] told [buyer] the truth when it represented

that the business was in compliance with law and whether it intended to comply with its notice and related obligations are essentially private matters."); *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 (N.Y. 1995) (allegations of sham investigation by insurance company not consumer oriented because of, *inter alia*, sophistication of the parties, uniqueness of the agreement and absence of disparate bargaining positions.)[1]

B. *Fraud and Fraudulent Inducement*

"Under New York law, a fraud cause of action generally does not arise where the alleged fraud merely relates to a breach of contract." *EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265, 278 (S.D.N.Y. 2004). However, under certain limited circumstances, it is possible to sustain a claim of fraudulent inducement arising out of a contractual relationship. To do so, "one must plead any of the following: (i) a legal duty separate from the duty to perform under the contract; or (ii) a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) special damages that are caused by the misrepre-

[1] The line of New York state and federal cases cited by Plaintiff in support of its argument that a physician may bring an action under GBL § 349 are inapposite, as those cases, insofar as they discuss § 349, deal only with the issue of standing, and not the public interest. *See, e.g., Vitolo v. Dow Corning Corp.*, 166 Misc.2d 717, 724 (N.Y. Sup. Ct. 1995) (addressing issues of standing under § 349 and finding that any person who has been injured due to a violation of § 349 may sue); *see also Blue Cross & Blue Shield of New Jersey v. Phillip Morris USA, Inc.*, 178 F. Supp.2d 198, 240-1 (E.D.N.Y. 2001) (Weinstein, J.) (*quoting Vitolo v. Dow Corning* for the proposition that some states permit suit by physicians, noting the lack of a clear rule across jurisdictions, and acknowledging usual requirement of either public interest or consumer nexus).

sentation and unrecoverable as contract damages." *G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 269 (S.D.N.Y. 2001). In this instance, Plaintiff alleges both that Defendant owed him a legal duty separate from the duties inherent in the contract and that Defendant made fraudulent misrepresentations upon which Plaintiff relied in entering into the contract.

Duty of Care Independent of Contractual Duties

Plaintiff's argument that Defendant owed him a legal duty separate and distinct from the contract is based largely on *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (N.Y. 1992). In *Sommer*, the plaintiff alleged that defendant was negligent in turning off plaintiff's fire alarm system, in violation of both the agreement between the parties and a New York City fire regulation, and thereby exacerbated a fire which damages plaintiff's 43-story building. *Id.* at 552. As a result, the court found that plaintiff's claims sounded in both tort and contract. *Id.* at 553 ("Fire alarm companies thus perform a service affected with a significant public interest; failure to perform the service carefully and competently can have catastrophic consequences. The nature of [defendant's] service and its relationship with its customer therefore gives rise to a duty of reasonable care that is independent of [defendant's] contractual obligations.").

The Court of Appeals clarified *Sommer* in *New York Univ. v. Continental Ins. Co.*, 87 N.Y. 308 (N.Y. 1995) ("*NYU*"), in which plaintiff argued that New York Insurance Law imposed an additional duty on defendant to exercise due care in investigating claims and dealing fairly with their insured and the public at large. *Id.* at 317. There, the Court of Appeals stated that it "did not [in *Sommer*] . . . suggest

that statutory provisions necessarily or generally impose tort duties independent of contract obligations." *Id.* The court recognized the "catastrophic consequences" that could flow from the type of negligence found in *Sommer* and the special importance of the careful performance of fire alarm services contracts. *Id.* Upon these bases, the court declined to find a separate duty in *NYU* and rejected plaintiff's argument that Insurance Law created a separate duty of care. *See also Pfizer, Inc. v. Stryker Corp.*, 2003 WL 21660339, at *2 (S.D.N.Y. Jul. 15, 2003) (describing *Sommer* and its progeny as a "limited class of cases in which a strong public interest in the careful performance of particular contractual obligations may give rise to a tort duty of due care" and finding public interest in defendant's performance of several covenants found in contract supplying prosthetic devices not "so exceptional as to warrant the creation of an independent extra-contractual duty"). These cases suggest that imposition of an independent duty of care in an arms-length business transaction is reserved for the most serious of situations directly affecting the public at large, and not sophisticated parties.

Additionally, the *NYU* decision held that "if the statute does not permit a private right of action . . . it cannot be construed to impose a tort duty of care . . . separate and apart from the . . . contract." 87 N.Y.2d at 318. In this case, Plaintiff argues that regulations promulgated by the FDA, 21 C.F.R. part 820, impose a separate duty on Defendant to perform the contract with due care, as Defendant is required by law to, *inter alia*, investigate complaints with its products and disclose known risks to those responsible for assuring the quality of the product. (Pl. Mem. of Law Ex. 8.) However, like the state insurance law regulation in *NYU*, there is no private right of action to enforce FDA

regulation, *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997), making Plaintiff's argument unpersuasive.

Fraudulent Misrepresentations Collateral or Extraneous to the Contract

"Where . . . a party warrants and represents a present existing fact, there simply is no reason why it should not have a remedy in contract for breach of the warranty and a remedy in tort for deliberate, fraudulent misrepresentation, assuming the facts otherwise justify such relief." *See Pfizer*, 2003 WL 21660339, at *1; *see also EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265 (S.D.N.Y. 2004) ("alleged misrepresentations of fact made to induce the contract are collateral to the actual terms of the contract"). However, on these facts, Plaintiff is unable to show a fraudulent misrepresentation that encouraged him to enter the contract.

"To recover damages for fraud, a plaintiff must prove (1) a misrepresentation or omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury." *Jablonski v. Rapalje*, 14 A.D.3d 484, 487 (N.Y. App. Div. 2005). At a minimum, Plaintiff has failed to demonstrate his justifiable reliance on any misrepresentation made by Defendant. Though Plaintiff argues that, under *Jablonski*, "whether reliance upon the fraudulent misrepresentation is justified is a question of fact," Pl. Mem. of Law at 13, the full *Jablonski* quote reads: "whether a party could have ascertained the facts with reasonable diligence so as to *negate justifiable reliance* is a factual

question." *Jablonski*, 14 A.D.3d at 488 (emphasis added). Therefore, this sentence stands for the proposition that *once demonstrated* by Plaintiff, justifiable reliance can be rebutted by Defendant by a preponderance of the evidence under certain circumstances. The statement does not assist Plaintiff in making a prima facie showing that he in fact relied on any misrepresentation in deciding to enter into the agreement with Defendant. *See generally Vermeer Owners, Inc. v. Gerald Guterman*, 78 N.Y.2d 1114, 1116 (N.Y. 1991) ("Although it is clear that the offering plan contained statements that were demonstrably false ... [n]othing in this record establishes that plaintiffs in fact relied on any misrepresentation by defendants to their detriment."); *see also Pacs Indus. v. Cutler-Hammer, Inc.*, 103 F. Supp. 2d 570 (E.D.N.Y. 2000) (Spatt, J.) (granting judgment on the pleadings dismissing fraud claim where only reliance shown was purchase of defendant's product).

Though Plaintiff now claims that "Mentor's representations with respect to the one to two percent deflation rate were 'critical' to his decision to switch to the MLV," Pl. Mem. of Law at 14, he made no such suggestion prior to his opposition papers to Defendant's motion for summary judgment. These new allegations are insufficient to create a genuine issue of material fact because: "[i]t is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." *Mack v. United States*, 814 F.2d 120, 124 (2d Cir. 1987); *see also Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996) ("[F]actual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial."); *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969);

("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would generally diminish the utility of summary judgment as a procedure for screening out sham issues of fact.").

The fact that Plaintiff may have inquired as to the deflation rate does not show his reliance thereon, particularly because Plaintiff admitted in his deposition that he did not remember the exact deflation rate that he was told by Defendant. (Def. Mem. of Law Ex A at 284.) At oral argument, Plaintiff repeatedly directed the Court's attention to documents that, it argues, prove Defendant's material misrepresentation as to the deflation rate of the MLVs and/or Plaintiff's knowledge of these alleged misrepresentations—but not reliance thereon. (*See, e.g.*, Transcript of 3/17/06 Oral Argument at 23 (pointing to Defendant's 1991 "Dear Doctor" letter alleging deflation rate of less than 2%;) *id.* at 25 (suggesting that "a reasonable surgeon has a right to rely" on deflation rates); *id.* at 26-28 (in response to Court's request that Plaintiff demonstrate a prima facie showing of reliance, Plaintiff directs Court to a document regarding Defendant's knowledge of the umbilicus technique rather than Plaintiff's reliance on deflation rate); *id.* at 31 (equating Plaintiff's deposition testimony that he thinks he was told that the deflation rate was 1-2% with Plaintiff's reliance thereon).) At no point did Plaintiff present evidence prior to the instant motion for summary judgment that he did, in fact, rely on any of the statements or document to which he draws this Court's attention. Therefore, having failed to demonstrate each element of his fraud claim by clear and convincing evidence (as is required at this stage, *Dallas Aerospace, Inc.*

v. CIS Air Corp., 352 F.3d 775, 784 (2d Cir. 2003)), Plaintiff claims of fraud and fraudulent inducement must fail.

CONCLUSION

The Complaint is hereby dismissed. Section 349 of New York's General Business Law was not intended to apply to arms-length business transactions between sophisticated parties, but rather, ought to redress wrongs committed against consumers in general. According to the Complaint, the wrongs committed by Defendant and damages sought are almost entirely related to Plaintiff's business and reputation. Section 349 does not apply under these circumstances. Additionally, Plaintiff's claim that Defendant's fraudulent misrepresentations induced him to enter into an agreement to purchase the MLV implants is without merit, as Plaintiff has failed to show his reliance on any misrepresentation prior to contracting with Defendant to purchase the implants. That claim, too, is dismissed. The Clerk of the Court is directed to close the case.

SO ORDERED.

Dated: March 31, 2006
Brooklyn, NY

/s/ Sandra L. Townes
SANDRA L. TOWNES
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT

Appellate Division Docket No. 1995-11307
234 A.D.2d 361; **651 N.Y.S.2d 104;**
1996 N.Y. App. Div. LEXIS 12984; CCH Prod. Liab.
Rep. P14,843; 34 U.C.C. Rep. Serv. 2d (Callaghan) 304
November 14, 1996, Argued
December 9, 1996, Decided

ROBERT VITOLO,

Respondent,

v.

DOW CORNING CORPORATION,

Defendant,

and

BRISTOL-MYERS SQUIBB COMPANY, INC., et al.,

Appellants.

In an action, *inter alia*, to recover damages for negligence, the defendants Bristol-Myers Squibb Company, Inc., Surgitek, Inc., and Medical Engineering Corp. appeal from so much of an order of the Supreme Court, Richmond County (Leone, J.), dated November 21, 1995, as denied their motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them.

Bracken, J. P., Copertino, Joy and Altman, JJ., concur.

Sedgwick, Detert, Moran & Arnold, New York, N.Y. (David M. Covey, Peter M. Kutil, and Howard R. Cohen of counsel), for appellants.

David A. Green, New York, N.Y. (Elyse E. Entin of counsel), and David Ironman, Staten Island, N.Y., for respondent (one brief filed).

OPINION

Ordered that the order is modified by deleting the provisions thereof which denied those branches of the appellants' motion which were to dismiss the causes of action to recover damages for negligence and negligence per se insofar as asserted against them and substituting therefor provisions granting those branches of the appellants' motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff is a reconstructive and plastic surgeon. Prior to 1992, a large part of his practice was devoted to cosmetic breast surgery using silicone implants that he purchased from the appellants. In 1992, the United States Food and Drug Administration found silicone breast implants to be unsafe and imposed a moratorium on their use. As a result, several of the plaintiff's patients sued him to recover damages, *inter alia*, for malpractice, and the plaintiff's practice suffered. The plaintiff subsequently commenced this action against the manufacturers of the breast implants and the silicone gel that is used in them. The plaintiff claimed he suffered economic harm and loss of income due to the negative publicity about silicone

breast implants and the defendants' failure to disclose their risks. The plaintiff's complaint asserts causes of action to recover damages for (1) common-law negligence, (2) negligence per se, (3) fraud and fraudulent misrepresentation, and (4) violation of General Business Law § 349, which prohibits deceptive business acts and practices.

The plaintiff seeks to recover damages for economic loss, not for personal injuries or property damage. If the underlying transaction is deemed to be a sale of goods, and thus falls within UCC article 2, the plaintiff's remedies are limited to his contractual remedies, and he may not maintain the traditional tort causes of action of negligence and strict products liability (*see*, *Schiavone Constr. Co. v Elgood Mayo Corp.*, 56 NY2d 667, *revd for reasons stated by Silverman, J., at App Div* 81 AD2d 221; *Word Mgt. Corp. v AT&T Information Sys.*, 135 AD2d 317, 321). On the other hand, if the underlying transaction is deemed to be predominantly service oriented, it falls outside of UCC article 2, and the plaintiff does not have a cause of action to recover damages for breach of implied or express warranty, but he does have a negligence cause of action (*see*, *Milau Assocs. v North Ave. Dev. Corp.*, 42 NY2d 482, 486; *Word Mgt. Corp. v AT&T Information Sys.*, *supra*). If service dominates the transaction and the transfer of personal property is merely incidental to that transaction, then it is deemed to be predominantly service oriented (*see*, *McDowell v Atco Rubber Prods.*, 221 AD2d 876).

It cannot be said that service dominated the transactions between the plaintiff and the appellants. Although the appellants may have serviced the plaintiff's account by, *inter alia*, inspecting defective implants and providing the plaintiff with medical and product information, those services were incidental to the transfer of silicone breast

implants to the plaintiff. Therefore, the underlying transaction is deemed to be a sale of goods, UCC article 2 applies, and the plaintiff may not maintain negligence causes of action against the appellants (*see*, *Schiavone Constr. Co. v Elgood Mayo Corp.*, *supra*; *Word Mgt. Corp. v AT&T Information Sys.*, *supra*; *McDowell v Atco Rubber Prods.*, *supra*).

We have considered the appellants' remaining contentions and find that they are without merit.

Bracken, J. P., Copertino, Joy and Altman, JJ., concur.

SUPREME COURT OF NEW YORK,
RICHMOND COUNTY

Index No. 12624/94,
Cal. Nos. 14, 1412 & 4379
166 Misc. 2d 717; **634 N.Y.S.2d 362**;
1995 N.Y. Misc. LEXIS 484
September 28, 1995, Decided

ROBERT V. VITOLO,

Plaintiff,

v.

DOW CORNING CORPORATION ET AL.,

Defendants.

Skadden, Arps, Slate, Meagher & Flom, New York City, for Dow Corning Corporation, defendant. *Sedgwick, Detert, Moran & Arnold,* New York City, for Bristol-Myers Squibb Company, Inc., and others, defendants.

David A. Green, New York City, for plaintiff.

OPINION

John Leone, J.

This is an action to recover damages founded upon allegations of negligence, fraud, fraudulent misrepresentations, and violation of statute.

Plaintiff is a physician. His practice is devoted either exclusively or primarily to plastic, reconstructive and cosmetic surgery. As part of his practice, plaintiff prescribes and inserts mammary implant devices in his patients.

Defendants Bristol-Myers Squibb Company, Inc., Surgitek, Inc., and Medical Engineering Corporation manufactured and/or distributed the breast implants which were furnished to plaintiff. Defendant Dow Corning Corporation supplies the raw material, i.e., the silicon gel utilized in the breast implants.

Plaintiff alleges that he is board certified by the American Society of Plastic and Reconstructive Surgeons. He purchased the cosmetic breast implant devices from defendants, who represented these devices as safe via labelling, advertising, promotional materials, mail, and oral statements, between 1978 and 1991. In January 1992, silicone breast implants were banned from use by the Federal Food and Drug Administration (FDA).

Plaintiff claims to have utilized defendants' breast implants in approximately 1,800 patients between 1978 and 1992. A number of those patients sued plaintiff in malpractice due to various problems with the implants he inserted, including breakage, rupturing, and their sequela. A number of patients also sued defendants directly without naming Dr. Vitolo.

Plaintiff asserts that as a result of this and other litigation concerning silicone breast implants, and the negative publicity it has engendered, he has suffered damage to his professional practice and to his professional reputation. He further says that documentation reveals that defendants failed to disclose known problems with the implants, distributed them to physicians without proper testing, failed to advise physicians such as plaintiff concerning known

risks of their use, suppressed data tending to show adverse effects upon rupture of the implant, and instructed their representatives to advise physicians to ignore FDA warnings and to ignore the consequences of leakage. Had he known of these defects, he would have either used another product or abandoned this aspect of his practice.

As damages, plaintiff seeks recovery for the loss of breast implant patients who might have otherwise been candidates therefor, damage to his reputation and loss of patients due to the negative publicity and negative public perception of breast implant procedures, loss of income, economic harm to the growth of his practice, and loss of income due to his required participation in trials, depositions, etc., and other out-of-pocket costs.

Defendants now move for an order dismissing this action pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

In support of the motion, movants argue that this is a "classic" tort claim for "reputational damages" and cites *Morrison v National Broadcasting Co.* (19 NY2d 453) in support of the proposition that a tort claim for economic loss due to injury to reputation sounds only in defamation, even when the alleged injury results from conduct. In *Morrison*, plaintiff was a university professor who appeared on television quiz shows. He alleged that the shows were rigged and that other contestants were supplied with the answers to the questions. These arrangements were the subject of Grand Jury and congressional investigations. The plaintiff in *Morrison* sought recovery for the loss of two fellowships he would have received but for the scandal.

Movants also argue that the law does not recognize a duty on the part of defendants such as these to protect

physicians from the risk of bad publicity or damage to reputation resulting from loss of patients, citing, *inter alia, Palsgraf v Long Is. R. R. Co.* (248 NY 339, 345).

Morrison v National Broadcasting Co. (supra) is readily distinguishable. In *Morrison,* the plaintiff never alleged negligence; he asserted, as a basis of recovery, the rather broad tort of intentional infliction of economic injury, a theory that the Court of Appeals refused to recognize. At bar, Dr. Vitolo asserts three causes of action, all of which are recognized at common law: negligence, fraud, and fraudulent misrepresentations. The fourth cause of action, violation of New York General Business Law § 349 (protection from deceptive acts and practices), will also be discussed herein.

Because this is not a defamation action, defendant Dow Corning's alternative argument that this action is barred by the one-year Statute of Limitations applicable to such actions must also fail.

More importantly, actions of this specific nature have been reported and recognized in other jurisdictions. In *Oksenholt v Lederle Labs.* (294 Ore 213, 656 P2d 293), it was held by the Supreme Court of Oregon that a physician could maintain an action in negligence and fraud against a prescription drug manufacturer that misrepresented its product to the physician, and further, that the physician could recover certain foreseeable damages as a result of any misconduct. Plaintiff therein alleged, in a manner nearly identical to the plaintiff at bar, that he relied on information provided by defendant in prescribing its product Myambutol, that defendant knew or should have known about the hazards of the drug and/or deliberately withheld information about its side effects. This drug

caused blindness in one of plaintiff's patients, who sued both plaintiff and defendant.

The *Oksenholt* court rejected defendant's argument that the case was one seeking recovery for economic loss caused by a physical injury to a third person. It found that defendant had an obligation to warn plaintiff physician of the drug's side effects, and the ramifications of any breach of that obligation, including economic loss, were recoverable as damages.

That court also concluded that the facts supported a cause of action for fraudulent misrepresentation. As here, the "plaintiff alleged that defendant published the information about the drug for the purpose of advising physicians like the plaintiff that the representations made by defendant were made with the intent that physicians, including plaintiff, rely on them, that plaintiff did rely on them, and was harmed as a result". *(Oksenholt v Lederle Labs.*, 294 Ore, at 223, 656 P2d, at 299, *supra.)*

In *Washington State Physicians Ins. Exch. & Assn. v Fisons Corp.* (122 Wash 2d 299, 858 P2d 1054), the Supreme Court of Washington found that that State's Consumer Protection Act, essentially equivalent to New York's General Business Law § 349, gave rise to a statutory cause of action in favor of a physician under facts equivalent to those under consideration.

Also, an unreported trial court verdict has been rendered in favor of a plaintiff such as the one at bar. In *Conlee v McGhan Med. Corp.* (No. 81-4062, Tex, Nuecas County Dist Ct, Dec. 15, 1983), a jury awarded $ 11.1 million, including $ 10 million punitive damages in favor of a physician against the manufacturer of inflatable breast prostheses, to compensate for mental anguish caused and income lost by plaintiff who was compelled to replace 48

defective products without charge. The action was founded upon theories of fraud and negligence.

Similarly, the Court of Appeals of this State *(Kennedy v McKesson Co.*, 58 NY2d 500)* held that a dentist had a cause of action against the manufacturer of an anesthetic machine. He arranged for the machine's repair, and when it was returned, the color codes identifying oxygen and nitrous oxide were reversed. Defendant failed to inform plaintiff that connectors of differing sizes for the oxygen and nitrous oxide could have been installed which would have prevented improper connection. When plaintiff performed an extraction on a patient, he thought he was administering oxygen, but in reality gave her a deadly amount of nitrous oxide. The Court of Appeals held that a cause of action in negligence had been stated, entitling plaintiff to recover losses.

Defendant's attempt to distinguish *Kennedy (supra)* by arguing that the defendant therein was a seller of services (the repairs) rather than a seller of goods as in the matter *sub judice* draws a distinction without a real difference. Defendant has not cited any authority that the distinction is relevant to the issue of defendant's liability as a matter of law, and this court can perceive none. Defendants also attack the complaint on the ground that it lacks sufficient particularity of the fraud claims. (CPLR 3016[b].) In the court's view, the complaint satisfies the particularity requirement. It must be remembered that this section "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be

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* The plaintiff in *Kennedy (supra)* was more in the nature of a "learned intermediary", to whom a duty to warn may exist *(see, Desmarais v Dow Corning Corp.*, discussed hereinafter).

interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud' ". *(Lanzi v Brooks,* 43 NY2d 778, 780.) This is so especially in circumstances such as this, where plaintiff alleges, in large part, that material information was withheld from or misrepresented to him, and that the facts were peculiarly within defendant's knowledge *(Banner Indus. v Schwartz,* 181 AD2d 479).

Defendants argue that plaintiff's second cause of action, asserting the theory of negligence "per se", must fall. They argue that plaintiff is not within the class of persons intended to be protected by statute, i.e., the Medical Device Amendments of 1976, set forth in 21 USC § 360c *et seq.* The Medical Device Amendments are silent on whether physicians such as plaintiff are within the protected class. However, there exists a duty under the Medical Device Amendments on the part of the manufacturer to warn the physician of any risks attendant to the use of the product, under the "learned intermediary doctrine" *(Desmarais v Dow Corning Corp.,* 712 F Supp 13, 17-18). The failure to discharge or perform one's duty to another when it is the proximate cause of one's damages gives rise to a cause of action on behalf of the injured party *(see, Becker v Schwartz,* 46 NY2d 401, 410; *Kennedy v McKesson, supra,* 58 NY2d, at 504).

Two aspects of the damages sought to be recovered by plaintiff must be addressed. In paragraph 30(f) of the complaint, which contains allegations common to all four causes of action, plaintiff asserts a "loss of income to his practice and other damages" which include "emotional harm" in having to deal with patients whose breast implants were

defective. Such emotional injuries are not recoverable *(Kennedy v McKesson, supra)*.

Similarly, paragraph 30(g) seeks recovery of loss of income due to the time necessarily spent on trials, depositions, and other litigation-related matters in which he was sued as a defendant. These items of plaintiff's purported lost income are too indirect to be compensable *(Goldberg v Mallinckrodt, Inc.*, 792 F2d 305, 307-308).

Other than these items of damage, plaintiff is entitled to recovery for any losses he is able to demonstrate at trial *(Kennedy v McKesson, supra)*.

Next, the court must address the issue of whether plaintiff has standing to sue under General Business Law § 349. Defendants argue that plaintiff, as a physician, is not a "consumer" of goods and services within the statute. However, the statute, by its terms, gives *any person* who has been injured due to a violation thereof the right to bring an action. The definition of "person" is much broader than "consumer", embracing all possible plaintiffs, including business persons. (Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 Brook L Rev 509, 527.) "[T]he . . . statute contains no language that can be construed as requiring either a causal connection between the purchase of an item and the injury or any kind of relationship between the injured plaintiff and the injuring defendant" *(id.*, at 528). There is no requirement of privity, and victims of indirect injuries are permitted to sue under the Act. *(Id.; see also, Washington State Physicians Ins. Exch. & Assn. v Fisons Corp.*, 122 Wash 2d 299, 312-313, 858 P2d 1054, 1060-1061, *supra.)* There is no reason why a physician under these circumstances cannot be treated as a "consumer" entitled to protection *(see, Phelps v Sherwood Med. Indus.*, 836 F2d 296,

300-303). For these reasons, the motion by defendants Bristol-Myers Squibb Co., Surgitek, Inc., and Medical Engineering Corp., and the motion by defendant Dow Corning Corporation for an order dismissing the complaint for failure to state a cause of action is denied in all respects.

Plaintiff cross-moves for an order granting him leave to serve a written interrogatory upon defendants. The single interrogatory is narrow in scope, and seeks information as to similar claims and lawsuits made against defendants.

CPLR 3130 (1) provides in part: "In the case of an action to recover damages for personal injury, injury o property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court."

The substance of the interrogatory is not objectionable, since discovery of similar incidents or claims is material in cases where a defect is alleged in the design or creation of a product *(Kolody v Supermarkets Gen. Corp.*, 163 AD2d 276 [2d Dept]).

The statute cited above merely precludes use of both interrogatories and depositions predicated *solely* on a cause or causes of action for negligence without leave of court. Here, the action is not founded solely on theories of negligence. Further, the unique nature of this litigation, and the limited scope of the interrogatory, lean heavily in favor of such leave.

Accordingly, the motion is granted.

Finally, it appears that defendant Dow Corning Corporation has filed for bankruptcy protection in the United States Bankruptcy Court in Michigan since these motions

were entered (NYLJ, May 25, 1995, at 5, col 4). Accordingly, all future proceedings in this action against Dow Corning are stayed until vacated by the Bankruptcy Court (11 USC § 362).